

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)

Revision of Part 22 and Part 90)
of the Commission's Rules to)
Facilitate Future Development)
of Paging Systems)

WT Docket No. 96-19

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

Petition for Partial Reconsideration

Thomas Gutierrez
J. Justin McClure
Lukas, McGowan, Nace &
Gutierrez, Chartered
Suite 1200
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 857-3500

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SUMMARY

Mtel is generally supportive of the actions taken by the Commission in its Order. Overall, they track the positions set forth in Mtel's comments in this proceeding. As a result, this petition focuses only on the Commission's decision not to recognize the nationwide character in frequency 931.4375 MHz.

That key determination, based solely on an assertion that Mtel had no "expectation" of nationwide authority for 931.4375 MHz, is insupportable. The Commission decision did not address in any proper matter the arguments in support of nationwide treatment presented by Mtel. It is also wholly at odds with the Commission's criteria for nationwide status as set forth herein, and with its prior recognition of this being a nationwide frequency. It also conflicts with numerous prior Commission decisions where it rejected "expectation" arguments by licensees.

The Order fails to further the Commission's goal, based upon statutory mandate, of increasing regulatory parity between CCP and PCP licensees. Nor does it reflect any genuine consideration of whether the public interest would be better served by licensing Mtel's frequency on a nationwide basis.

While the Commission's treatment of frequency 931.4375 MHz in the Order may result in additional revenues being raised, it serves no legitimate purposes and presents untold risks. Chief among these is the possibility that either speculators or unscrupulous incumbent licensees would seek this frequency solely to frustrate Mtel or exact monies in some improper fashion. After all, the frequency is open for licensing only in outlying areas, where numerous other frequencies that have no tie to nationwide systems are also available, presumably at a very low cost.

Mtel requests reconsideration of that portion of the Order which denies Mtel nationwide exclusivity for frequency 931.4375 MHz, and urges grant to Mtel of such authority. This redesignation will promote regulatory parity, formalize the operational status of the channel and serve the public interest.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
Revision of Part 22 and Part 90)	WT Docket No. 96-18
of the Commission's Rules to)	
Facilitate Future Development)	
of Paging Systems)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act --)	
Competitive Bidding)	

To: The Commission

Petition for Partial Reconsideration

Mobile Telecommunication Technologies Corp. ("Mtel")^{1/} and its wholly owned subsidiary, SkyTel Corporation (collectively, "Mtel"), by their attorneys and pursuant to Section 1.429(d) of the Commission's Rules, 47 C.F.R. Section 1.429(d), hereby petitions for partial reconsideration of the Commission's decision in the captioned proceeding.^{2/} This petition is limited to a single issue: The Commission's determination not to grant nationwide

^{1/} Mtel and its subsidiaries, including SkyTel and Destineer Corp. ("Destineer"), are Commission licensees providing a wide range of high technology wireless communications services. SkyTel holds a Commercial Mobile Radio Service ("CMRS") network paging license and multiple non-network paging licenses operating over frequency 931.4375 MHz on a de facto nationwide basis. Destineer Corp. was awarded a Pioneer's Preference to operate an advanced nationwide wireless network in the narrowband Personal Communication Service ("PCS") and is currently the only nationwide narrowband PCS service provider.

^{2/} Second Report and Order and Further Notice of Proposed Rulemaking, in WT Docket No. 96-18 and PP Docket No. 93-253, 62 Fed. Reg. 11616, March 12, 1997 ("Order"). Pursuant to Section 1.429(d) of the Commission's rules Petitions for Reconsideration would be due on April 11, 1997. Accordingly, this Petition is timely filed.

exclusivity rights to Mtel's 931.4375 MHz channel (the "931.4375 MHz Determination").

For the reasons set forth below, Mtel submits that the Commission erred in rejecting the 931.4375 MHz nationwide status proposal that the Commission itself included in the Notice in this proceeding.^{3/} Both the public interest generally and the specific goals that the Commission sought to further in this proceeding, would be better served were the Commission to recognize nationwide exclusivity for Mtel. In support thereof, the following is respectfully shown.

I. BACKGROUND

A. The Notice

In the Notice the Commission proposed to implement revolutionary changes to its paging regulations in order to promote continued growth and preserve vigorous competition in the paging industry. The Commission proposed to transition to a geographic licensing approach whereby the Commission will issue one license for each frequency for each specified geographic area, rather than grant individual licenses on a transmitter-by-transmitter basis.

In a matter involving Mtel uniquely, the Commission invited comment on whether to designate the Common Carrier Paging ("CCP") channel 931.4375 MHz licensed to SkyTel as a nationwide channel and thus not subject to geographic licensing. The Commission also


^{3/} See, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Notice of Proposed Rulemaking, 11 FCC Rcd 3108 (1996) (the "Notice").

sought comment on its proposal to adopt competitive bidding rules for mutually exclusive paging applications, so that available channels may be assigned rapidly to applicants who will expedite service to the public.

B. Responsive Comments

In its Comments filed in this proceeding, Mtel generally endorsed the Commission's proposed geographic licensing plan to adopt geographic licensing.^{4/} Mtel further agreed with the Commission's proposal to exclude from its geographic licensing plan those channels that already have been assigned to single licensees on a nationwide basis.^{5/} While Mtel supported the use of competitive bidding for mutually exclusive applications Mtel also urged that the Commission's proposal be refined to protect legitimate incumbent paging operators having extensive investment, operations and coverage from unnecessary problems associated with speculators or others who may wish to block the growth of existing systems in order to stifle competition.

Mtel also strongly urged adoption of the Commission's proposal to redesignate formally channel 931.4375 MHz on a nationwide basis and exempt it from the geographic licensing proposal. Grant of this proposal would further Commission compliance with its statutory mandate to create regulatory parity among CCP and Private Carrier Paging ("PCP") service providers and would facilitate the



creation of a level playing field for carriers licensed in the different services. See Mtel Comments at 9-11.

Several Commenters provided their qualified support to this proposal so long as the Commission accorded other similarly situated licensees the same opportunity for nationwide status.^{6/} For example, Mobilemedia Communications, Inc. ("MobileMedia") incorporated many of Mtel's previous comments into its own and also undertook to demonstrate how it operates a "de facto" nationwide channel similar to Mtel. See MobileMedia Comments at 21 and 22.

C. The Order

In the Order, the Commission adopted rules governing geographic area licensing of CCP and 929 MHz PCP, and use of competitive bidding procedures for auctioning mutually exclusive applications for these licenses. In particular, the Commission determined that all mutually exclusive applications for non-nationwide 931 MHz channels and exclusive non-nationwide 929 MHz channels will be subject to competitive bidding, and that the country would be subdivided into 51 geographic licensing areas, each consisting of a Major Trading Area ("MTA"). Order at para. 16. Further, nationwide 931 MHz and 929 MHz geographic licenses would be granted to the three nationwide CCP channels identified in Section 22.531(b) of the Commission's rules and for those 929 MHz channels where a licensee had sufficient authorizations as of

^{6/} See e.g., Joint Comments of Arch Communications Group and WestLink Licensee Corporation at 5, Airtouch Paging at 9, MobileMedia at 21, United Paging Resources at 3, and American Paging at 2.

February 8, 1996, to qualify for exclusivity under Section 90.945.^{7/} These nationwide authorizations would not be subject to competitive bidding.

Yet, the Commission decided not to grant Mtel nationwide exclusivity on its 931.9475 MHz channel. The lone rationale expressed in the Order was that such action would presumably confer benefits that Mtel did not "expect". Order at para. 53.

II. ARGUMENT

A. The Commission Erred in not Giving Proper Consideration To The Grant Of Nationwide Exclusivity For Mtel's 931.4375 MHz Channel

The Commission's 931.4375 MHz Determination simply did not address the meaningful arguments that Mtel presented. It is therefore arbitrary and capricious.

When making a decision the FCC must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"^{8/} Only where "all the relevant factors and available

^{7/} The Commission decided that in order to obtain nationwide exclusivity a system must consist of at least 300 transmitters, provide service to 50 markets, including 25 of the top 50 markets, and serve at least two markets in each of the seven regions modelled on the RBOC regions. See PCP Exclusivity Order in PR Docket No. 93-35, 8 FCC Rcd 8318 (1993).

^{8/} See, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) ("State Farm") (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

alternatives were given adequate consideration" can a Commission decision be upheld.^{9/}

In this instance, the Commission clearly did not base its decision on an examination of the relevant factors or consider the available alternatives. As stated above the Commission gave no recognition to the fact that Mtel has invested millions of dollars and built out its system on 931.4375 MHz well beyond the point which would earn it nationwide exclusivity if Section 90.495, 47 C.F.R. § 90.495, applied to the system.^{10/} As is reflected in Section 90.495 of its rules, the Commission's application of that section to 929 MHz licensees illustrates that build out is a focal consideration when the Commission considers awarding nationwide status. Therefore, the Commission should have given substantial weight to Mtel's build out when making its decision.

When deciding whether to grant nationwide licenses to PCP carriers the Commission considered whether licensees had met conditional requirements for nationwide licenses by substantially building out their systems.^{11/} The Commission recognized that where this build out had taken place it would be in the public interest to grant the licensee a nationwide license.^{12/} Yet, in

^{9/} Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413, 1426 (D.C. Cir. 1983) ("Church of Christ").

^{10/} Mtel notes that it has placed in service on 931.4375 MHz almost three times the number of transmitters required for nationwide exclusivity.

^{11/} Order, at para. 46.

^{12/} Id.

rendering the 931.4375 MHz Determination which denied Mtel a nationwide license, the Commission did not address Mtel's argument that it had built out a very substantial system on 931.4375 MHz with over 800 transmitters. Nor did it even address Mtel's arguments that the public interest would be served if Mtel were granted a nationwide license on that frequency, and that it would be frustrated if other parties, who would have no desire to build and operate on this frequency were permitted to vie for it. Lack of proper consideration of these factors makes the Commission's 931 MHz Determination on this issue insupportable.

Mtel presented multiple other issues in its comments before the Commission. Yet the Commission failed to address a single one. For instance, the Commission did not consider that its action would likely open up 931.4375 MHz to greenmail, since Mtel is the only licensee on this channel and the one with the greatest need for it. As Mtel previously advised the Commission, there are numerous other paging channels available in those outlying areas which are not presently served by Mtel. See, Mtel Comments at 10. Thus, any bid by another party for 931.4375 MHz could only be an attempt to extract some greenmail payment from Mtel or otherwise cause it competitive harm.

The Commission also did not point to any detrimental effect that would result from granting Mtel a nationwide license on

931.4375 MHz.^{13/} Nor did it weigh the benefits of granting Mtel a nationwide license. Instead, it merely denied Mtel's request because Mtel "had no expectation that nationwide exclusivity would result from build-out."^{14/} The Commission did not engage in reasoned decision making when it singularly focused on Mtel's "expectation" and nothing else.^{15/} Such hasty reasoning conflicts with the Commission's obligation to consider all the available alternatives.^{16/}

It has long been Commission policy that it must balance all relevant interests when reaching a decision.^{17/} Clearly, the Commission made no attempt to do so in this case since it failed to consider Mtel's interest as well as that of the public. Indeed, the Commission's failure to "address [] the significant comments made in the rulemaking proceeding" about the benefits of bestowing

^{13/} As Mtel previously advised the Commission, no other party would be harmed by providing Mtel with nationwide exclusivity on 931.4375 MHz because it is the only licensee on this channel. See, Mtel Comments at 10. Indeed, as the rules now stand, this is the only channel that has a single licensee yet is not recognized as being exclusive on a nationwide basis.

^{14/} Order, at para. 53.

^{15/} See, Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1091-92 (D.C. Cir. 1987).

^{16/} See, State Farm, *supra*, and Church of Christ, *supra*.

^{17/} See, e.g., Memorandum Opinion and Order on Remand in ET Docket No. 93-266; Gen. Docket No. 90-314; and PP-6, PP-52, and PP-58; 9 FCC Rcd 4055 (1994) ("Order on Remand"), where the Commission acknowledges its obligations in this regard and cites, with approval, McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993) for the same proposition.

nationwide exclusivity on 931.4375 MHz renders its order arbitrary and capricious, Church of Christ, 707 F. 2d at 1424.

B. The Commission's Internal Inconsistent Treatment of Similarly Situated Parties Renders Its Decision Arbitrary and Capricious

Commission reliance on "expectancy" is particularly inappropriate in view of the fact that the Commission set forth the criteria for nationwide exclusivity in the Order, at paragraph 50, and expectancy is not among those criteria listed. Thus, such criteria should be applicable to Mtel. This criteria does not include any required expectation. In fact, the Commission also awarded nationwide geographic area licenses to four licensees who had enough authorizations as of February 8, 1996 to qualify for exclusivity on a conditional basis.^{18/} The Commission even provided for an exception to the PCP exclusivity criteria by granting nationwide exclusivity on 929.8875 MHz to Nationwide 929.8875 LLC.^{19/} Yet the Commission did not explain how it could find that the public interest would be served by a grant of a nationwide geographic license to Nationwide 929.8875 LLC which has only about 300 transmitters and not to Mtel which has more than 800 transmitters!^{20/}

The inconsistency between the conditions the FCC recognized as necessary for PCP nationwide exclusivity and how it treated

^{18/} See, Order at para. 51.

^{19/} See, Order at para. 52.

^{20/} See Section IID., infra, where the need to explain a basis for apparently disparate treatment is discussed.

similarly situated 931 MHz licensees necessarily makes the 931.4375 Determination arbitrary and capricious. See, General Chemical Corp. v. United States, 817 F. 2d 844, 857 (D.C. Cir. 1987) (internal inconsistency renders decision arbitrary and capricious).

C. The Commission Erred in Finding That Mtel Had No Expectation To Nationwide Exclusivity, and that Such Expectation was a Prerequisite

1. Mtel Had a Legitimate Expectancy

The only rationale provided by the Commission for not granting Mtel exclusivity is that grant would confer benefits that Mtel did not "expect". Order at para. 53. The Commission's expectation argument is simply insupportable for the several reasons discussed below.

Mtel did have a legitimate expectation that its 931.4375 Mhz frequency would be treated as a nationwide frequency in this proceeding. Mtel, like every other licensee, has long had a legitimate expectation that it would be treated in the same manner as other similarly situated parties. The law demands it.^{21/} Since Mtel's build out is consistent with the criteria required for PCP nationwide exclusivity, it is similarly situated to those PCP licensees receiving nationwide exclusivity and it reasonably expected to be treated as such.^{22/} In fact, in establishing

^{21/} See, Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 237 (D.C. Cir. 1985), citing NLRB v. Washington Star Co., 732 F.2d 974, 977 (D.C. Cir. 1984). See, also, Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965)

^{22/} See, In the Matter of Amendment of the Commission's Rules To Provide Channel Exclusivity To Qualified Private Paging (continued...)

nationwide exclusivity for PCP licensees, the Commission specifically noted that

[I]n our view, PCP licensees who invest in a system that provides service on a national scale should be entitled to nationwide exclusivity.

Equally important, however, the Order was promulgated in a rule making proceeding which provided the perfect vehicle by which the Commission has an opportunity to bring Mtel's nationwide rights into harmony with those of other paging carriers. After all, prior nationwide allocations and assignments were made in such proceedings.^{23/}

Were there any questions regarding licensees having a legitimate expectation that similarly situated parties would be treated similarly, it was erased on August 10, 1993, when Congress enacted the Budget Act^{24/} in which it, inter alia, amended Section 332 of the Act to categorize and define CMRS and PMRS. See 47 U.S.C. § 332. There, Congress mandated that similar mobile services be accorded similar regulatory treatment.^{25/} Without

^{22/} (...continued)

Systems At 929-930 MHz, Notice of Proposed Rulemaking, 8 FCC Rcd. 2227, 2230 (1993) (the "Exclusivity Notice") at para. 26.

^{23/} See, e.g., PCP Exclusivity Order in PR Docket No. 93-35, 8 FCC Rcd 8318 (1993).

^{24/} Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) (the "Budget Act").

^{25/} CMRS is defined as "any mobile service (as defined in section 3(n) of the Act) that is provided for profit and makes interconnected service available (A) to the public or (B) to
(continued...)

question, both CCP and PCP are both CMRS and must be accorded similar treatment. Thus, Mtel submits that the Commission's no "expectation" rationale simply cannot support its 931 MHz Determination.

Mtel had special reason to expect that it would receive nationwide exclusivity for 931.4375 MHz if others were accorded it. On two previous occasions, the Commission specifically recognized Mtel as being unique among all non-network licensees in its use of 931.4375 MHz exclusively for nationwide paging.^{26/} As Mtel noted in its Comments, when it recognized SkyTel's unique use of this frequency the Commission accorded it one key privilege then unique of nationwide status: Preemption of state regulation of SkyTel's use of this frequency.^{27/} This uniqueness is further evidenced by the fact that in the same decisions in which the Commission provided special recognition of Mtel's nationwide use of 931.4375

^{25/} (...continued)

such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). PMRS is defined as "any mobile service (as defined in Section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service...." 47 U.S.C. § 332(d)(3).

^{26/} See, Mobile Telecommunication Technologies Corp., 6 FCC Rcd 1938, recon. 7 FCC Rcd 4061 (1992). See also In re Amendment of Sections 22.505 and 22.506 of the Commission's Rules, 8 FCC Rcd 2796 (1993).

^{27/} The Commission stated that "state regulation over the minimal intrastate component of Mtel's service will thwart and impede the achievement of a valid, longstanding federal goal that is furthered by Mtel's integration of a new frequency (931.4375 MHz) into its existing network -- the establishment and development of a thriving paging service that can provide coverage throughout the nation." 7 FCC Rcd at 4062.

MHz, the Commission declined other licensee's requests for similar treatment because it recognized that they had not shown themselves to be similarly situated in view of Mtel's unique use of this frequency on a nationwide basis.^{28/} Among other things, the Commission's prior decisions recognized that Mtel pioneered nationwide paging service and focuses on nationwide paging, while the vast majority of those carriers who now enjoy nationwide exclusivity provide nationwide service only as an adjunct.^{29/}

These are added reasons why the expectation rationale cannot support the Commission's 931.4375 MHz Determination. Nowhere is specific "expectancy" identified as being an absolute criterion or prerequisite for entitlement to similar treatment in a rulemaking proceeding.

**2. The Commission Employed Incorrect Criteria
In Assessing Whether Frequency 931.4375 MHz
Should Have Been Granted On A Nationwide Basis**

Reliance solely on an expectation rationale to decline to grant Mtel nationwide exclusivity is also inconsistent with countless previous decisions providing nationwide exclusivity for paging, and with basic tenets of administrative law.

Administrative law, like any other branch of law, is dynamic rather than static in character. Licensees and applicants are

^{28/} See, Mobile Telecommunication Technologies Corp., supra.

^{29/} Exclusivity was not then requested or conveyed in the State Preemption Decisions because Mtel's request was made prior to the PCP Exclusivity Order and Mtel understood that a rulemaking proceeding, like the current one, rather than a declaratory ruling, was the appropriate vehicle by which to obtain exclusivity.

expected to understand the rights they have pursuant to existing rules and law.^{30/} They also are expected to appreciate that, while there are certain fundamental limitations on how much existing laws and rules can change when they impact on pending applicants^{31/}, both rules and laws can and will change over time. While they cannot be held to predict future changes with specificity, they certainly can expect to be treated the same as similarly situated parties.

PCP licensees were accorded the benefits of all these changes without there being a consideration of whether they had a legitimate "expectancy" for them. Similarly, when the Commission amended its rules governing 929 MHz paging in order to provide for channel exclusivity to qualified local, regional, and national paging systems, previously licensed PCP carriers obtained immediate entitlements to newly promulgated rights without having to demonstrate any legitimate "expectancy".^{32/}

^{30/} Many FCC forms specifically require that applicants certify such familiarity. See, e.g., Form 310; see also Form 401 as used in the Public Mobile Services for several years.

^{31/} See, e.g., the Commission's decisions involving the use of lotteries to select unserved area cellular applicants and MMDS applicants. Memorandum Opinion and Order, PP Docket No. 93-253, 9 FCC Rcd 7387 (1994) and Report and Order, MM Docket No. 94-131, PP Docket No. 93-253, 10 FCC Rcd 9589, 9630-34 (1995).

^{32/} For example, of the 40 channels allocated to 929 MHz paging, 30 channels originally were designated for private internal use and 10 channels for PCP use. Second Report and Order, One-Way Paging Stations in the Domestic Public and the Private Land Mobile Services, Gen. Docket No. 80-183, 91 FCC 2d 1214 (1982). In 1985, the PCP allocation was increased to 20 channels, and PCPs were authorized to share the non-commercial
(continued...)

It is particularly ironic that, in view of its actions in the narrowband PCS Pioneer's Preference proceeding,^{33/} the Commission here cites "expectation" to Mtel. In its narrowband PCS proceeding, after continually reassuring Mtel that it would receive a nationwide narrowband PCS pioneer's preference license without charge and acknowledging Mtel's legitimate expectations in that regard, at the 11th hour, the Commission "modified" its position and has attempted to charge Mtel for that spectrum.^{34/}

In view of the above, the "no expectation" argument simply cannot support the Commission's 931 MHz determination.

^{32/} (...continued)

channels. Then in 1993, the Commission allowed PCP operators to provide service to the public on virtually the same unrestricted basis as CCP operators. Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, Report and Order, 8 FCC Rcd 4822 (1993).

^{33/} See, generally, Review of the Pioneer's Preference Rules, 8 FCC Rcd 7692, 7694 (1993); Review of the Pioneer's Preference Rules, 9 FCC Rcd 6605, 6610 n.21 (1994); Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, 9 FCC Rcd 1309, 1316 (1994); and Nationwide Wireless Network Corp., 9 FCC Rcd 3635 (1994).

^{34/} Chief Judge Edwards was less reserved in discussing the Commission's last minute change of heart. See, generally, Mobile Communications Corp. of America v. F.C.C., 77 F.2d 1399 (D.C. Cir. 1996). See, also, Third Report and Order, in PR Docket No. 89-552 (RM-8506), GN Docket No. 93-252 and PP Docket No. 93-253, FCC 97-57, 62 Fed. Reg. 16004-01 (April 3, 1997) where the Commission determined to return pending applications for nationwide commercial 220 MHz channels despite the fact that dozens of applicants, including Mtel, had applied for that spectrum (and paid substantial filing fees) with the legitimate expectation that the spectrum would be licensed consistent with the Commission's rules.

**D. The Commission's Grant of Nationwide
Exclusivity to Mtel for 931.4375 MHz
Would Promote Regulatory Parity**

The FCC's determination to deny nationwide exclusivity to Mtel even while at the same time according exclusive nationwide status to PCP providers whose services parallel in many ways (or are substantially less than) the system that Mtel has already built out -- contravenes the Act, as well as core administrative regulations by which the FCC is obligated to abide. In an era when regulatory parity is the law, it is difficult to fathom a more clear violation of this principle: in a single decision, the FCC grants nationwide exclusivity to PCP licensees and discusses why such grants further the public interest; at the same time it denies Mtel the same exclusivity without addressing that decision's effect on the public interest. The Commission's Order is utterly silent as to why licensees in substantially similar services are to be made to play by vastly disparate rules.^{35/}

Even holding aside the Congressional mandate for regulatory parity^{36/} -- which by itself provides an independent basis for the Commission to grant Mtel nationwide exclusivity on 931.4375 MHz -- the FCC's ruling violates controlling precedent. The FCC's

^{35/} In the Budget Act, Congress created the CMRS regulatory classification and mandated that similar commercial mobile radio services be accorded similar regulatory treatment under the Commission's rules. The broad goal of this action is to ensure that economic forces -- not disparate regulatory burdens -- shape the development of the CMRS marketplace. See, Third Report and Order, 9 FCC Rcd 7988 (1994).

^{36/} See, Section II(C)(1) of the Petition, *supra*.

action undermines the equity^{37/} that is at the core of the administrative process. It also vividly violates the common sense -- and judicially recognized -- principle that similarly situated parties must be accorded equal treatment. As Judge Mikva eloquently explained in addressing inconsistent FCC action in similar proceedings:

[A] sometimes-yes, sometimes-no, sometimes-maybe policy ... cannot ... be squared with our obligation to preclude arbitrary and capricious management of [an agency's] mandate.

Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 237 (D.C. Cir. 1985), citing NLRB v. Washington Star Co., 732 F.2d 974, 977 (D.C. Cir. 1984). See, also, Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965), where Chief Judge Bazelon chastised the FCC for treating two similarly-situated parties completely differently, especially when both "were considered by the Commission at virtually the same time", and where he warned the FCC that "[W]hatever action the Commission takes on remand, it must explain its reasons ... [and] the relevance of those differences to the purposes of the Communications Act." Melody Music, supra, 345 F.2d at 733. Here, where different treatment of similarly situated entities is provided for in the very same decision, the FCC's refusal to extend exclusivity rights to Mtel must be overturned.

Without question, the same public interest considerations that the Commission utilized in determining to grant exclusivity to PCP

^{37/} See Charles H. Koch, Jr., Administrative Law and Practice, West Publishing Co. (St. Paul, 1985), sect. 1.11.

licensees are equally applicable to Mtel's 931.4375 Mhz frequency.

The Commission specifically held that:

"[I]n our view, PCP licensees who invest in a system that provides service on a national scale should be entitled to nationwide exclusivity."^{38/}

This conclusion must be applied to Mtel as well and it should be entitled to nationwide exclusivity.^{39/} If the Commission elects not to reverse its 931.4375 MHz Determination, it must heed Judge Bazelon's comments and explain its reasons, and their relevance to the Act, for not doing so. Melody Music, supra, 345 F.2d at 733.

**E. The Public Interest Will Be Served By
Grant Of Nationwide Exclusivity For
Mtel's 931.4375 MHz Channel**

The Commission's 931.4375 MHz Determination will have material adverse effects on Mtel's existing subscribers, and on the enormous investment that Mtel has already made in the construction of a nationwide system on 931.4375 MHz. Conversely, grant of nationwide exclusivity to Mtel would serve the public interest.^{40/}

^{38/} See, Exclusivity Notice, 8 FCC 2230.

^{39/} See, Delmarva Power and Light Co. v. FERC, 770 F.2d 1131, 1143 n.9. (D.C. Cir. 1985) where the Court held that "It is a familiar tenet of administrative law that '[r]eview of the reasonableness of an administrative adjudication includes consideration of the administrator's consistency in deciding similar cases.'"

^{40/} In his speech delivered to the NAB State Leadership conference on February 24, 1997, Chairman Reed Hundt stated that "The Communications Act requires the Commission to ensure that all spectrum users serve the "public interest, convenience and necessary". If market forces alone would ensure that outcome in all cases, there would be no need for that provision, the single most important sentence in the Communications Act.

SkyTel is currently licensed to operate on more than 800 transmitters over frequency 931.4375 MHz in more than two hundred of the nation's largest markets. This is far more than necessary to qualify SkyTel for nationwide exclusivity on 931.4375 MHz if it were a PCP channel. Yet, with the Commission's refusal to redesignate 931.4375 MHz on a nationwide basis, SkyTel will be at an enormous competitive disadvantage to its PCP competitors in that it may not be permitted to expand its system. It may not be successful in the auction; but even if it is, necessary funds will be diverted to paying for authorizations instead of further infrastructure and improved coverage for the public. Mtel's experience has been that its customers continuously request wider coverage areas and the Commission's decision may have the effect of limiting any expansion by Mtel on 931.4375 MHz.

Despite the competitive harm that Mtel would face, the greatest harm would occur to Mtel's existing subscribers who may be precluded from receiving enhanced and expanded coverage. Further, those potential subscribers in areas not yet covered by Mtel may be harmed in that they will be foreclosed from having the ability to access a nationwide system should they become subscribers of a different 931.4375 MHz service provider.

The only known potential public interest benefit that could flow from the Commission's 931.4375 MHz Determination, i.e., the raising of revenues, is one that the Commission cannot consider when deciding whether auctioning off certain spectrum would be in the public interest. See, 47 USC §309(j)(7)(A) (Supp. 1993).

Mtel has already built out its system and is providing service to over 5,000 cities and towns throughout the country thus serving the public interest. A listing of cities covered by Mtel's 931.4375 MHz system (copy enclosed) reveals that it covers a vast majority of the population centers that the Commission proposes to auction. This listing of cities also demonstrates that the amount of auctionable area on 931.4375 MHz is limited and the public interest would be best served by allowing Mtel to continue expanding its existing nationwide coverage. Otherwise, the result would be that a new licensee would have limited coverage area which counters the Commission's goals of providing wide area services.

It is axiomatic that, in making equitable decisions, the Commission must consider the interests of all affected parties, as well as the public.^{41/} When the Commission considers the interests of all the parties, it can only properly determine that grant of nationwide exclusivity for frequency 931.4375 MHz would be in the public interest.^{42/} No other parties are licensed on 931.4375 MHz so there would be no adverse impact to any other party. The significant investment in capital and technological

^{41/} See, e.g., Memorandum Opinion and Order on Remand in ET Docket No. 93-266; Gen. Docket No. 90-314; and PP-6, PP-52, and PP-58; 9 FCC Rcd 4055 (1994) ("Order on Remand"), where the Commission acknowledges its obligations in this regard and cites, with approval, McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993) for the same proposition.

^{42/} The Commission did not engage in reasoned decision making when it focused on Mtel's expectation, while ignoring significant impacts to the public in the process. See, Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1091-92 (D.C. Cir. 1987).

resources invested by Mtel will be protected. The public will have a fully competitive nationwide service from which to choose thereby increasing the public's service and pricing options for nationwide service. Lastly, but perhaps most importantly, granting Mtel exclusivity is necessary to allow it to compete on a level playing field with its nationwide PCP competitors that will not be faced with the constraints that Mtel otherwise would be.

III. CONCLUSION

The Order strives to assure that paging spectrum is being effectively utilized and to reduce the regulatory burdens on paging licensees and the Commission. This goal appears to be accomplished to a large extent. But the Commission erred in its 91 MHz determination. The rationale provided by the Commission for its action simply does not support that decision and reconsideration is appropriate.

The redesignation of 931.4375 MHz on a nationwide basis would serve the public interest. It would recognize the actual operational status of this frequency and would be consistent with Commission policy and the Commission's treatment of other licensees. Accordingly, Mtel respectfully requests that the Commission reconsider its 931 MHz Determination and provide Mtel

with an exclusive nationwide authorization, as it has done for similarly situated PCP providers.

Respectfully submitted,

MOBILE TELECOMMUNICATION
TECHNOLOGIES CORPORATION

and

SKYTEL CORPORATION

By: 

Thomas Gutierrez
J. Justin McClure

Its Attorneys

Lukas, McGowan, Nace &
Gutierrez, Chartered
1111 Nineteenth Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 857-3500

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